

**THAMEEZ NISHA HASSEEM v. ANITHA FARHANA
SHARBUDEEN & ANOR**

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
VERNON ONG LAM KIAT JCA
YEOH WEE SIAM J

[CIVIL APPEAL NO: W-02(NCVC)(W)-2068-11-2016]
13 SEPTEMBER 2017

LAND LAW: *Assignment – Deed of assignment – Whether ‘instrument’ within ss. 2, 4(1) & 4A(1) of Stamp Act 1949 – Purpose – Whether only for assignment of property – Whether transfer effected – Whether instrument of transfer by way of Form 14A*

LAND LAW: *Indefeasibility of title – Registered title – Challenge against registered title – Allegation that deed of assignment invalid – Deed of assignment – Whether conveyance document as envisaged in ss. 215, 217, 218 and 340(2) of National Land Code – Whether transfer of property invalid*

REVENUE LAW: *Stamp duty – Instruments – Deed of assignment – Whether ‘instrument’ within ss. 2, 4(1) & 4A(1) of Stamp Act 1949 – Whether s. 4A of Stamp Act applies to instrument executed outside Malaysia to effect transfer of any immovable property in Malaysia – Whether ad valorem duty payable – Whether stamp duty imposed on instrument and not on transaction*

Bee Fathima (‘the deceased’) passed away on 23 February 1993 in India leaving behind the appellant and her four siblings, one of whom was RKM Sharbudeen, her brother. RKM Sharbudeen passed away on 13 January 2014 in India leaving behind four children and beneficiaries, one of whom was the first respondent, the administrator of the estate of RKM Sharbudeen. Pursuant to a sale and purchase agreement (‘SPA’) dated 21 May 1973, the deceased had purchased a property from the vendor/developer (‘the second respondent’) and the full purchase price was paid by the deceased during her life time. It was the appellant’s case that the first respondent had deceitfully and fraudulently caused the second respondent to transfer the property to RKM Sharbudeen by utilising the false deed of assignment purportedly made by the deceased on 10 December 1992 before a Notary Public in India. As a consequence, the second respondent transferred the property to RKM Sharbudeen by way of a Form 14A dated 26 October 2010 which was registered on 6 December 2010. The appellant therefore, applied for, *inter alia*: (i) a declaration that the deed of assignment dated 10 December 1992 purportedly made between the deceased as assignor and RKM Sharbudeen as the assignee in respect of the property was invalid, null and void and be set aside; (ii) a declaration that the transfer in Form 14A and the registration

- A thereof from the second respondent, as transferor, to RKM Sharbudeen, as the transferee, pursuant to the deed of assignment was invalid, null and void and be set aside; and (iii) an order that the second respondent do execute a transfer in Form 14A to the appellant in her capacity as the administratrix of the estate of the deceased pursuant to cl. 10(3) of the SPA between the
- B second respondent and the deceased. The Judicial Commissioner ('JC') held, *inter alia*: (i) the appellant had not discharged the burden of proving that the deed of assignment was a forgery; (ii) apart from alleging that only nominal value of stamp duty paid on the deed of assignment, the appellant did not call any witness to adduce evidence as to what was the actual stamp duty payable
- C on the transfer; and (iii) the registration of the transfer in Form 14A was valid and was not liable to be set aside under s. 340(2) of the National Land Code ('the NLC'). Hence, the appeal which was confined to the issue as to whether the JC was right in holding that the deed of assignment which was made outside Malaysia was not an instrument as defined in s. 2 of the Stamp Act 1949 ('the Stamp Act') and whether it was void for want of payment of *ad*
- D *valorem* duty as required by s. 4A read with s. 16 of the Stamp Act and item 32(a) of the First Schedule to the same Act and whether the transfer under the NLC was invalidated for that reason.

Held (dismissing appeal with costs)

Per Yeoh Wee Siam J delivering the judgment of the court:

- E (1) The deed of assignment was an 'instrument' within the meaning of ss. 2, 4(1) and 4A(1) of the Stamp Act pursuant to which 'duty' is chargeable as specified in the First Schedule. The appellant bore the burden of proving that *ad valorem* duty was chargeable on the deed of
- F assignment. Hence, it was incumbent upon the appellant to call the Collector as a witness to confirm that *ad valorem* duty must be paid for the deed of assignment and not just a nominal duty. In the absence of such evidence from the Collector, it was not wrong for the JC to accept the deed of assignment on the face of the document that the duty chargeable thereon was the nominal duty that had already been paid for
- G the said deed. Therefore, the deed of assignment was valid and the assignment of the property by the deceased, as assignor, to RKM Sharbudeen, as assignee, was valid. (paras 21 & 22)
- H (2) The deed of assignment serves only the purpose of assignment of the property to RKM Sharbudeen. The deed of assignment could not be taken as the instrument of transfer to effect the transfer of the property by the second respondent to RKM Sharbudeen. Thus, clearly the question of such transfer not taking effect under s. 4A of the Stamp Act did not even arise. (para 23)

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- (3) Section 4A of the Stamp Act applies to an instrument executed outside Malaysia to effect a transfer of any immovable property in Malaysia. However, in this case, the instrument to effect the transfer of the property from the second respondent to RKM Sharbudeen was in the form of a memorandum of transfer *ie*, Form 14A, which was duly executed within Malaysia and not the deed of assignment. Thus, the appellant's contention that the deed of assignment executed outside Malaysia was invalid for alleged failure to comply with s. 4A *ie*, that no *ad valorem* stamp duty was paid on the deed of assignment, did not hold water. The deed of assignment was not the instrument that effected the transfer of the property to RKM Sharbudeen which could allow the appellant to invoke s. 4A to invalidate and render ineffective such transfer. (paras 26 & 27) A B C
- (4) The JC had rightly made the finding of facts and came to the conclusion that the instrument of transfer in this case was the Form 14A (memorandum of transfer) dated 26 October 2016 and *ad valorem* stamp duty had in fact been charged on the instrument of transfer upon proper adjudication and had been duly paid for to effect the transfer of the property from the second respondent to RKM Sharbudeen. Therefore, there was no reason why the transfer ought not to have taken effect, as under the Stamp Act, stamp duty is imposed on the instrument and not on a transaction. (para 28) D E
- (5) Section 340 of the NLC offers protection to a registered title. The property herein had already been registered in the name of RKM Sharbudeen and he had obtained indefeasibility of title under s. 340(1) of the NLC. The only way that such indefeasibility of title could be defeated is to mount a challenge if there exists any of the exceptions laid down in s. 340(2) of the NLC. However, the appellant had not challenged the indefeasibility of title of RKM Sharbudeen under the exceptions provided in s. 340(2) of the NLC. The appellant had abandoned the issue on forgery of the deed of assignment by the first respondent at the outset of the hearing of this appeal and confined her appeal to only the issue of non-payment of *ad valorem* duty on the deed of assignment. Therefore, the appellant would not be able to rely on the exceptions in the case of fraud or forgery as provided in s. 340(2)(a) and (b) of the NLC respectively. (paras 29 & 33) F G
- (6) The other exception under s. 340(2)(b) of the NLC relevant to this appeal was that the registration or transfer was 'obtained by means of an insufficient or void instrument'. The void instrument referred to in the context of the factual matrix of this case was the memorandum of transfer in Form 14A. The deed of assignment was not a conveyance H I

A document as envisaged in ss. 215, 217, 218, and in particular, s. 340(2) of the NLC. Thus, the transfer of the property by the second respondent to RKM Sharbudeen could not be invalidated by questioning the validity of the deed of assignment which was not the conveyance document. (para 34)

B *Bahasa Malaysia Headnotes*

Bee Fathima ('si mati') meninggal dunia pada 23 Februari 1993 di India meninggalkan perayu dan empat orang adik-beradik, salah seorang daripadanya ialah RKM Sharbudeen, saudara lelakinya. RKM Sharbudeen meninggal dunia pada 13 Januari 2014 di India meninggalkan empat orang anak dan benefisiari, salah seorang daripadanya responden pertama, pentadbir harta pusaka RKM Sharbudeen. Menurut satu perjanjian jual beli ('PJB') bertarikh 21 Mei 1973, si mati membeli sebuah hartanah daripada penjual/pemaju ('responden kedua') dan harga belian penuh telah dibayar si mati semasa hayatnya. Kes perayu adalah bahawa responden pertama secara menipu dan penipuan menyebabkan responden kedua memindah milik hartanah tersebut kepada RKM Sharbudeen menggunakan surat ikatan penyerahhakan palsu yang kononnya dibuat oleh si mati pada 10 Disember 1992 di hadapan Notari Awam di India. Akibatnya, responden kedua memindah milik hartanah tersebut kepada RKM Sharbudeen melalui Borang 14A bertarikh 26 Oktober 2010 yang didaftarkan pada 6 Disember 2010. Perayu, oleh itu, memohon, antara lain: (i) deklarasi bahawa surat ikatan penyerahhakan bertarikh 10 Disember 1992 yang kononnya dibuat antara si mati sebagai penyerah hak dan RKM Sharbudeen sebagai penerima hak berkaitan dengan hartanah tersebut tidak sah dan batal dan perlu diketepikan; (ii) deklarasi bahawa pindah milik dalam Borang 14A dan pendaftarannya daripada responden kedua sebagai, pemberi milikan, kepada RKM Sharbudeen, sebagai penerima milikan, menurut surat ikatan penyerahhakan tidak sah dan batal dan perlu diketepikan; dan (iii) satu perintah bahawa responden kedua memeterai pindah milik dalam Borang 14A kepada perayu dalam kapasitinya sebagai pentadbir harta pusaka si mati menurut kl. 10(3) PJB antara responden kedua dan si mati. Pesuruhjaya Kehakiman ('PK') memutuskan, antara lain: (i) perayu tidak melepaskan beban pembuktian bahawa surat ikatan penyerahhakan adalah penipuan; (ii) selain mendakwa bahawa hanya nilai nominal duti setem dibayar atas surat ikatan penyerahhakan, perayu tidak memanggil mana-mana saksi untuk mengemukakan keterangan mengenai jumlah duti setem yang perlu dibayar bagi pindah milik tersebut; dan (iii) pendaftaran pindah milik dalam Borang 14A adalah sah dan tidak wajar diketepikan bawah s. 340(2) Kanun Tanah Negara ('KTN'). Dengan itu, rayuan ini yang terhad pada isu sama ada PK betul apabila memutuskan bahawa surat ikatan penyerahhakan yang dibuat di luar Malaysia bukan

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instrumen yang didefinisi dalam s. 2 Akta Setem 1949 ('Akta Setem') dan sama ada terbatal atas kegagalan membayar duti *ad valorem* seperti yang diperlukan bawah s. 4A dibaca bersama-sama dengan s. 16 Akta Setem dan item 32(a) Jadual Pertama pada Akta yang sama dan sama ada pindah milik bawah KTN tidak sah atas alasan tersebut.

Diputuskan (menolak rayuan dengan kos)

Oleh Yeoh Wee Siam H menyampaikan penghakiman mahkamah:

- (1) Surat ikatan penyerahhakan adalah 'instrumen' dalam maksud ss. 2, 4(1) dan 4A(1) Akta Setem yang menurutnya 'duti' boleh dikenakan seperti yang dinyatakan dalam Jadual Pertama. Perayu memikul beban pembuktian bahawa duti *ad valorem* boleh dikenakan atas surat ikatan penyerahhakan. Oleh itu, adalah penting bagi perayu memanggil Pemungut Hasil sebagai saksi untuk mengesahkan bahawa duti *ad valorem* mesti dibayar bagi surat ikatan penyerahhakan dan bukan hanya duti nominal. Apabila tiada keterangan sedemikian daripada Pemungut Hasil, tidak salah bagi PK menerima surat ikatan penyerahhakan secara zahirnya bahawa duti yang dikenakan atasnya adalah duti nominal yang telah pun dibayar bagi surat ikatan itu. Oleh itu, surat ikatan penyerahhakan adalah sah dan penyerahhakan hartanah tersebut oleh si mati, sebagai pemberi hak, kepada RKM Sharbudeen, sebagai penerima hak, adalah sah.
- (2) Surat ikatan penyerahhakan hanya bertujuan menyerahkan hak dalam hartanah kepada RKM Sharbudeen. Surat ikatan penyerahhakan tidak boleh dikatakan sebagai instrumen pindah milik untuk memindah milik hartanah tersebut oleh responden kedua kepada RKM Sharbudeen. Oleh itu, jelas bahawa persoalan bahawa pindah milik sedemikian tidak berlaku bawah s. 4A Akta Setem tidak timbul sama sekali.
- (3) Seksyen 4A Akta Setem terpakai pada instrumen yang dimeterai di luar Malaysia untuk membolehkan pindah milik apa-apa harta tak boleh alih di Malaysia. Walau bagaimanapun, dalam kes ini, instrumen untuk membolehkan pindah milik hartanah daripada responden kedua kepada RKM Sharbudeen adalah dalam bentuk memorandum pindah milik iaitu Borang 14A, yang telah dimeterai dalam Malaysia dan bukan surat ikatan penyerahhakan. Oleh itu, hujahan perayu bahawa surat ikatan penyerahhakan yang dimeterai di luar Malaysia tidak sah atas kegagalan mematuhi s. 4A iaitu duti setem *ad valorem* tidak dibayar bagi surat ikatan penyerahhakan, tidak boleh dikekalkan. Surat ikatan penyerahhakan bukan instrumen yang membolehkan pindah milik hartanah tersebut kepada RKM Sharbudeen yang sepatutnya membenarkan perayu membangkitkan s. 4A untuk membatalkan dan menjadikan pindah milik itu tidak berkesan.

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- A (4) Pesuruhjaya Kehakiman membuat dapatan fakta yang betul dan memutuskan bahawa instrumen pindah milik dalam kes ini adalah Borang 14A (memorandum pindah milik) bertarikh 26 Oktober 2016 dan duti setem *ad valorem* telah dikenakan atas instrumen pindah milik tersebut atas penilaian yang sewajarnya dan telah dibayar untuk
- B menguatkuasakan pindah milik hartanah tersebut daripada responden kedua kepada RKM Sharbudeen. Oleh itu, tiada alasan mengapa pindah milik tersebut tidak boleh dilaksanakan, kerana di bawah Akta Setem, duti setem dikenakan atas instrumen dan bukan atas transaksi.
- C (5) Seksyen 340 KTN memberikan perlindungan pada hak milik berdaftar. Hartanah di sini telah pun didaftarkan atas nama RKM Sharbudeen dan dia telah memperoleh hak milik tak boleh sangkal bawah s. 340(1) KTN. Satu-satunya cara hak milik tak boleh sangkal boleh dinafikan adalah dengan mencabar jika terdapat apa-apa pengecualian yang disenaraikan dalam s. 340(2) KTN. Walau bagaimanapun, perayu tidak
- D mencabar hak milik tak boleh sangkal RKM Sharbudeen bawah pengecualian yang diperuntukkan bawah s. 340(2) KTN. Perayu telah mengabaikan isu penipuan surat ikatan penyerahhakan oleh responden pertama di awal perbicaraan rayuan ini dan mengehadkan rayuannya pada isu ketidakbayaran duti *ad valorem* atas surat ikatan penyerahhakan.
- E Dengan itu, perayu tidak boleh menyandar atas pengecualian dalam kes fraud atau penipuan seperti yang diperuntukkan masing-masing dalam s. 340(2)(a) dan (b) KTN.
- F (6) Satu lagi pengecualian bawah s. 340(2)(b) KTN yang relevan bagi rayuan ini adalah pendaftaran atau pindah milik 'diperoleh melalui instrumen yang tidak mencukupi atau batal'. Instrumen yang batal yang dirujuk dalam konteks fakta matriks kes ini adalah memorandum pindah milik dalam Borang 14A. Surat ikatan penyerahhakan bukan dokumen pemindahhakan, seperti yang dibayangkan oleh ss. 215, 217, 218 dan khususnya, s. 340(2) KTN. Oleh itu, pindah milik hartanah tersebut
- G oleh responden kedua kepada RKM Sharbudeen tidak boleh ditaksahkan dengan mempersoalkan kesahan surat ikatan penyerahhakan yang bukan dokumen pemindahhakan.

Case(s) referred to:

- H *Pemungut Duti Setem v. BASF Services (Malaysia) Sdn Bhd* [2010] 4 CLJ 556 CA (*refd*)
PPB Group Bhd v. Pemungut Duti Setem [2011] 1 LNS 1001 HC (*dist*)
Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors [2016] 4 CLJ 510 CA (*refd*)
Tan Chiw Thoo v. Tee Kim Kuay [1997] 1 CLJ 541 FC (*refd*)

Legislation referred to:

- I National Land Code, ss. 215, 217, 218, 340(1), (2)(a), (b)
Stamp Act 1949, ss. 2, 4(1), 4A(1), 16, First Schedule item 32(a)

For the appellant - Mahinder Singh Dulku & Mohd Iqbal Zainal Abidin; M/s Megat Iqbal & Co A

For the 1st respondent - T Gunaseelan & Ravin Vello; M/s Gunaseelan & Assocs

For the 2nd respondent - Yap Lai Lian; M/s KB Chua & Co

Reported by S Barathi

JUDGMENT

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Yeoh Wee Siam J:

Introduction

[1] This is an appeal by the plaintiff/appellant (“appellant”) against the decision of the High Court given on 12 October 2016 which dismissed the appellant’s claim against the first defendant/first respondent (“first respondent”) and the second defendant/second respondent (“second respondent”) with costs of RM35,000 to the first respondent and RM25,000 to the second respondent.

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Brief Facts

[2] According to the appellant’s pleaded case, Bee Fathima, the deceased (“the deceased”), passed away on 23 February 1993 in India leaving behind the appellant and her four siblings, one of whom was R.K.M. Sharbudeen a/l R.K.M Mohamed Abu Backer (“RKM Sharbudeen”), her brother.

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[3] RKM Sharbudeen passed away on 13 January 2014 in India leaving behind four children and beneficiaries, one of whom is the first respondent, the administrator of the estate of RKM Sharbudeen.

[4] According to the appellant, the deceased had purchased the property known as Lot No. 311, 2nd Floor, Ampang Park Shopping Centre (“property”) from the vendor/developer (“developer”), ie, the second respondent, by a sale and purchase agreement (“SPA”) dated 21 May 1973 (RR Jld 3 Bhg C pp. 247-272), and the full purchase price was paid by the deceased during her life time. Sometime in 2010, the second respondent transferred the property to RKM Sharbudeen on behalf of the deceased.

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[5] The appellant alleged that the first respondent deceitfully and fraudulently caused the second respondent to transfer the property to RKM Sharbudeen by utilising the false deed of assignment (“deed of assignment”) (RR Jld 3 Bhg C pp. 280-283) purportedly made by the deceased on 10 December 1992 before a notary public in the Tiruvarur District, Tamil Nadu, South India.

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[6] As a consequence of the alleged fraud committed by the first respondent, the second respondent transferred the property to RKM Sharbudeen by way of a Form 14A dated 26 October 2010 (RR Jld 3 Bhg C pp. 310-313) which was registered on 6 December 2010. The first respondent and her family have since been occupying the property.

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A The Appellant's Claim

[7] The appellant, in para. 13 of her amended statement of claim (KR Jld 1 Bhg A pp. 44-50) applied, *inter alia*, for the following reliefs:

- B (a) a declaration that the deed of assignment dated 10 December 1992 purportedly made between the deceased as assignor of the one part and RKM Sharbudeen as assignee of the other part in respect of the property is invalid, null and void and the same be set aside forthwith;
- C (b) a declaration that the transfer in Form 14A dated 26 October 2010 (Presentation No: 48216/2010) of the property and the registration thereof from the second respondent, as the developer and registered proprietor of the property, as transferor, to RKM Sharbudeen, as the transferee, pursuant to the deed of assignment is invalid, null and void and the same be set aside forthwith;
- D (c) an order that the second respondent do execute a transfer in Form 14A of the property to the appellant in her capacity as the administratrix of the estate of the deceased pursuant to cl. 10(3) of the SPA dated 21 May 1973 made between the second respondent, as the vendor of the one part, and the deceased, as the purchaser of the other part.

E Agreed Issues To Be Tried Before The High Court

[8] The learned Judicial Commissioner ("JC") summed up the agreed issues for trial before him as follows:

- F (i) Whether the Deed of Assignment dated 10.12.1992 was duly executed by Bee Fathima and attested by R.S Rajakumar, advocate and notary practicing (*sic*) in Tiruvarur, South India.
- (i) Whether Section 114(g) of the Evidence Act 1950 ought to be invoked against the 1st Defendant for refusal to produce the original Deed of Assignment for inspection and examination by the expert witness.
- G (ii) Whether the said Deed of Assignment is invalid for any other reasons.
- (iii) Whether the said Deed of Assignment is invalid under Section 4A of the Stamp Act 1949.
- H (iv) If the answer to issue No. (i) is in the negative and the rest of the issues are in the affirmative, that is the said Deed of Assignment is void and/or invalid, it therefore follows that the transfer in Form 14A dated 26.10.2010 and registered on 6.12.2010 is void and liable to be set aside under Section 340(2) of the National Land Code, 1965 in the hand of the estate of Bee Fathima, deceased.
- I (see grounds of judgment of the High Court at RR Jld1 Bhg A pp. 22 and 23).

Decision Of The High Court

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[9] Regarding issues (i), (ii) and (iii) above, the learned JC held that the appellant had not discharged the burden of proving that the deed of assignment is a forgery.

[10] Regarding issue (iv) above, the learned JC held that the deed of assignment was stamped with the nominal value of stamp duty. Even though the appellant contended that the deed of assignment is void, invalid and has no effect because no *ad valorem* stamp duty was paid as required under s. 4A of the Stamp Act 1949, the learned JC held that apart from alleging that only nominal value of stamp duty was paid on the deed of assignment, the appellant did not call any witness to adduce evidence as to what was the actual stamp duty payable on transfer of the property transacted with the deed of assignment.

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[11] The learned JC then stated the following:

(27) Whilst it may be true that the Deed of Assignment was stamped with the nominal value of stamp duty, the transfer was only effected *via* the Memorandum of Transfer dated 26-10-2010 (exhibit D19) which was duly registered and presented on 6-12-2010 *vide* Presentation No.48216/2010 (exhibit P10).

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(28) Based on the authorities furnished by both parties, I am incline (*sic*) to agree with the 2nd Defendant's counsel that it is the Memorandum of Transfer and not the Deed of Assignment, which is the instrument of transfer chargeable with *ad valorem* stamp duty as can be seen in exhibits in D20 and D21.

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(29) That being the case, the Plaintiff's submission that no proper and *valorem* stamp duty was paid for the assignment made by way of P6 is totally flawed and without basis.

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[12] Finally, the High Court held that in view of the answers to issues (i) to (iv) are all in the negative, the registration of the transfer in Form 14A dated 26 October 2010 and registered on 6 December 2010 is valid and not liable to be set aside under s. 340(2) of the National Land Code ("NLC").

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The Issue Before This Court

[13] At the outset of the hearing before this court on 1 June 2017, learned counsel for the appellant informed us that he would confine the appeal to only one issue for our determination, namely whether the learned JC is right in holding that the deed of assignment (exh. P6), which was made outside Malaysia is not an instrument as defined in s. 2 of the Stamp Act 1949, and whether it is void for want of payment of *ad valorem* duty as required by s. 4A read with s. 16 of the Stamp Act 1949 and item 32(a) of the First Schedule to the same Act, and further, whether the transfer under the NLC is invalidated for that reason.

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A Deliberation And Decision Of This Court

[14] The main submission of learned counsel for the appellant was that *ad valorem* duty had not been paid and hence the deed of assignment would be a void instrument to effect the transfer of the property as it would cause invalidity to Form 14A, the conveyance document effecting the transfer of the property to RKM Sharbudeen for whose estate the first respondent is the administrator.

The Relevant Provisions Of The Stamp Act 1949

[15] As submitted by learned counsel for the appellant, the following provisions of the Stamp Act 1949 are relevant and ought to be considered:

S. 2:

“instrument” “includes every written document”; and

“duty” means “any stamp duty for the time being chargeable under this Act or under any written law;

S. 4(1):

4. Instruments chargeable with duty.

(1) Subject to this Act and subject to the exemptions contained in this Act and in any written law for the time being in force, the several instruments specified in the First Schedule shall, from and after the commencement of this Act, be chargeable with the several duties specified in such Schedule.;

S. 4A(1)

4A. Stamp duty on instruments executed outside Malaysia effecting transfers of property in Malaysia.

(1) Any instrument executed outside Malaysia and purporting to effect a transfer of any immovable property, or of any movable property other than debentures issued by, or shares in, a company, shall, if the property intended to be transferred is situated in any part of Malaysia, be chargeable with stamp duty in accordance with the First Schedule, and unless the instrument of transfer, or a counterpart or duplicate thereof which shall be chargeable with the like duty as if it were the original, is brought into Malaysia and the proper stamp duty payable thereon as if the original had been executed in Malaysia is paid, the transfer shall not take effect.;

Items 32(a), 32(h) and 46 of the First Schedule to the Stamp Act 1949

32. CONVEYANCE,
ASSIGNMENT,
TRANSFER OR
ABSOLUTE
BILL OF SALE:

For every RM100 or fractional

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|---|--|--------|
| (a) On sale of any property (except stock, shares, marketable securities and accounts receivables or book debts of the kind mentioned in paragraph (c)) | part of RM100 of the amount of the money value of the consideration or the market value of the property, whichever is the greater: | A |
| ... | (i) RM1.00 on the first RM100,000.00; | B |
| | (ii) RM2.00 on any amount in excess of RM100,000 but not exceeding RM500,000; | |
| | (iii) RM3.00 on any amount in excess of RM500,000. | C |
| | ... | |
| (h) Of any property by way of gift (whether by way of voluntary disposition or otherwise) | See Gift and Section 16(1). | D |
| 46. GIFT | See Section 16(1). | |
| S. 16(1) and 16(3) | | |
| 16. Voluntary conveyance <i>inter vivos</i> . | | E |
| (1) Any conveyance or transfer operating as a voluntary disposition <i>inter vivos</i> shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale. | | |
| ... | | |
| (3) Any conveyance or transfer, not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration, shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition <i>inter vivos</i> , and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred. | | F
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| Submissions Of The Appellant | | |
| [16] Learned counsel for the appellant submitted that from a reading of the relevant provisions of the Stamp Act 1949 as set out above, it is absolutely clear that: | | H |

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- A (a) the deed of assignment is a gift and voluntary settlement and an instrument chargeable with payment of *ad valorem* stamp duty;
- (b) failure to pay the *ad valorem* stamp duty rendered the deed of assignment invalid, null and void and have no effect and, to borrow the words used in s. 4A of the said Act, the assignment or “the transfer shall not take effect”, which means that the deed of assignment is not recognised as a valid document under the law.
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[17] Learned counsel for the appellant relied on the High Court decision in *PPB Group Bhd v. Pemungut Duti Setem* [2011] 1 LNS 1001; [2011] 9 MLJ 145 which dealt with the application of item 32(a) of the First Schedule read with s. 16 of the Stamp Act 1949.

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[18] In that case, the collector for stamp duties imposed (“collector”) the payment of an *ad valorem* stamp duty on the instrument involved, namely the memorandum of transfer, and the parties who were involved in the instrument objected and contended that only a nominal stamp duty of RM10 is payable. Rohana Yusof J (as Her Ladyship then was) rejected the contention that only nominal stamp duty was payable and held that *ad valorem* stamp duty is payable as provided for by ss. 4 and 16 read with item 32(a) of the said Act. This is what the court said at paras. 7 and 12 of the judgment:

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E [7] Looking at s 16, I agree with the contention of the respondent that payment in *specie* is a voluntary disposition *inter vivos* as contemplated under s. 16(1) and (3) of the Act. In my view, s. 16(3) has been worded very widely to cover a transfer based on payment in specie. This is because s. 16 provides that where any conveyance or transfer is not a disposition made in favour of a purchase or incumbrancer or other person in good faith and for valuable consideration, it shall be deemed to be a conveyance or transfer operating as a voluntary disposition *inter vivos*. It is obvious that the transfer in the present case is not made in favour of purchaser or incumbrancer and other person in good faith. Thus using this provision the transfer in this case is disposition *inter vivos*.

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G ...

[12] In my view there is no issue of expanding the definition of sale here. What happens in fact is that the respondent in determining the stamp duty under s. 4 was reading this clause subject to all the provisions of the Act including s. 16. In applying s. 16, the respondent found that the transaction involved falls under s. 16 because it is a voluntary disposition *inter vivos*. Hence, these transfers are caught by s. 16(3). This is because s. 16(3) says disposition made in favour of a purchaser or incumbrancer in good faith and with valuable consideration is deemed to be voluntary disposition *inter vivos*.

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- [19] Learned counsel for the appellant then submitted that in the present case, the second respondent transferred the property to RKM Sharbudeen pursuant to the deed of assignment because the second respondent accepted RKM Sharbudeen as the beneficial owner of the property by reason of the absolute assignment of the property by the deceased to RKM Sharbudeen pursuant to the deed of assignment. Therefore, the learned JC had misdirected himself in holding that the deed of assignment is not an instrument within the meaning of the various relevant provisions of the Stamp Act 1949, and the learned JC came to the wrong finding or conclusion that no *ad valorem* stamp duty is payable on the deed of assignment. A B
- [20] Learned counsel for the appellant further submitted that the learned JC ought to have held that the deed of assignment is an instrument within the meaning of the Stamp Act 1949 and therefore is chargeable with *ad valorem* stamp duty. As this was not done, the learned JC ought to have held that the deed of assignment is void and accordingly set aside the transfer in Form 14A of the property by the second respondent in favour of RKM Sharbudeen pursuant to the void deed of assignment. C D
- [21] With respect to the learned JC, we agree with the submission of learned counsel for the appellant that the deed of assignment is an “instrument” within the meaning of ss. 2, 4(1) and 4A(1) of the Stamp Act 1949 pursuant to which “duty” is chargeable as specified in the First Schedule. Similarly, we agree that the decision in *PPB Group Bhd (supra)* in regard to payment of *ad valorem* duty on the instrument involved. However, we are of the view that *PPB Group Bhd* ought to be distinguished for the reason that the instrument involved in that case is a memorandum of transfer, and not a deed of assignment as in the present case. Thus, for the purposes of the present case, it cannot be concluded that based on *PPB Group Bhd*, *ad valorem* duty is chargeable on a deed of assignment. E F
- [22] Having said that, we however agree with the learned JC that the appellant bears the burden of proving that *ad valorem* duty is chargeable on the deed of assignment. Learned counsel for the appellant submitted that it is merely a question of law and there is no necessity to prove the amount of duty chargeable on the deed of assignment. With respect, we are of the view that it is incumbent upon the appellant to call the collector as a witness to confirm that *ad valorem* duty must be paid for the deed of assignment, and not just a nominal duty as in this case. In the absence of such evidence from the collector, it is not wrong for the learned JC to accept the deed of assignment on the face of the document that the duty chargeable thereon is the nominal duty that has already been paid for the said deed. Therefore, the deed of assignment is valid and the assignment of the property by the deceased, as assignor, to RKM Sharbudeen, as assignee, is valid. G H I

A [23] At this point, it is important to note that the deed of assignment serves only the purpose of assignment of the property to RKM Sharbudeen. By no means can the deed of assignment be taken as the instrument of transfer to effect the transfer of the property by the second respondent to RKM Sharbudeen. Thus, clearly the question of such transfer not taking effect under s. 4A of the Stamp Act 1949 does not even arise.

B [24] For the purpose of effecting any transfer of property under the NLC, it is the memorandum of transfer or Form 14A which is the instrument of transfer (see ss. 215, 217 and 218 of the NLC).

C [25] In the present case, as submitted by learned counsel for the second respondent, it is undisputed that based on the notice of adjudication/assessment (“Notis Taksiran Pindah Milik Harta Tanah (Duti *Ad Valorem*)”) dated 9 November 2010 (exh. D20 of CBOD B pp. 314-315 of RR Jld 3) and the Stamp Certificate (exh. D21 of CBOD B pp. 316 of RR Jld 3), both duly issued by Lembaga Hasil Dalam Negeri, upon proper adjudication/assessment by the collector, an *ad valorem* stamp duty was duly chargeable and thereafter paid for the Form 14A, to effect the transfer of the property under the NLC from the second respondent to RKM Sharbudeen.

E [26] We further agree with the second respondent’s submission that s. 4A of the Stamp Act 1949 applies to an instrument executed outside Malaysia to effect a transfer of any immovable property in Malaysia. However, in this case, the instrument to effect the transfer of the property from the second respondent to RKM Sharbudeen is in the form of a memorandum of transfer, ie, Form 14A dated 26 October 2016, which was duly executed within Malaysia, and NOT the deed of assignment.

F [27] Thus, the appellant’s contention that the deed of assignment executed outside Malaysia is invalid for the alleged failure to comply with s. 4A of the Stamp Act 1949, ie, that no *ad valorem* stamp duty was paid on the deed of assignment, does not hold water. This is because the deed of assignment is NOT the instrument that effected the transfer of the property to RKM Sharbudeen, which could allow the appellant to invoke s. 4A of the Stamp Act 1949 to invalidate and render ineffective such transfer.

G [28] Hence, we are of the view that the learned JC has rightly made the finding of facts and came to the conclusion that the instrument of transfer in this case is the Form 14A (memorandum of transfer) dated 26 October 2016 and *ad valorem* stamp duty had in fact been charged on the instrument of transfer upon proper adjudication and had been duly paid for to effect the transfer of the property from the second respondent to RKM Sharbudeen. Therefore, there is no reason why the transfer ought not to have taken effect, as under the Stamp Act 1949, stamp duty is imposed on the instrument and not on a transaction (see Court of Appeal decision in *Pemungut Duti Setem v. BASF Services (Malaysia) Sdn Bhd* [2010] 4 CLJ 556).

Indefeasibility Of Title Can Only Be Defeated By A Challenge Under s. 340(2) Of The NLC A

[29] Section 340 of the NLC offers protection to a registered title. In the present case, the property has already been registered in the name of RKM Sharbudeen and he has obtained indefeasibility of title under s. 340(1) of the NLC. The only way that such indefeasibility of title can be defeated is to mount a challenge if there exists any of the exceptions laid down in s. 340(2) of the NLC. B

[30] We now set out s. 340(1) and s. 340(2) of the NLC which are as follows: C

Registration to confer indefeasible title or interest, except in certain circumstances

340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions this section, be indefeasible. D

(2) The title or interest of any such person or body shall not be indefeasible

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or E

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law. F

[31] In *Tan Chiw Thoo v. Tee Kim Kuay* [1997] 1 CLJ 541; [1997] 2 MLJ 221, the Federal Court in allowing the appeal held, *inter alia*, as follows:

(1) ... The alienation of the lot which was state land had taken effect upon registration of the register of document of title to the respondent in September 1968. Such indefeasibility could only be defeated by any of the specified grounds under s. 340 of the NLC or any grounds of equity. In this case, no such ground existed. G

[32] The Court of Appeal in *Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors* [2016] 4 CLJ 510; [2016] 3 MLJ 660, applied *Tan Chiw Thoo (supra)* and at pp. 527 & 530 (CLJ); pp. 674, 675 & 677 (MLJ) stated as follows: H

[49] The first thing to remember with regard to the plaintiff's title is that upon registration, she acquired indefeasibility under s. 340(1) of the Land Code and such indefeasibility can only be defeated by any of the specified statutory grounds of fraud et cetera under s. 340(2) or other grounds of equity. It cannot be defeated by any other ground. I

A [50] None of such statutory grounds under s. 340(2) or other grounds of equity exists in relation to the issuance of the plaintiff's document of title. In fact the plaintiff's title was never and has never been impeached by reason of s. 340(2) or other grounds of equity.

...

B [68] At the risk repetition we must reiterate that the indefeasibility of the plaintiff's title cannot be challenged other than on grounds specified in s. 340(2) of the Land Code or other grounds of equity: *Tan Chiew Thoo* ...

C [33] In the present case, it is clear that the appellant had not challenged the indefeasibility of title of RKM Sharbudeen under the exceptions provided in s. 340(2) of the NLC. At the outset of the hearing of this appeal, the appellant had abandoned her issue on forgery of the deed of assignment by the first respondent and confined her appeal to only the issue of non-payment of *ad valorem* duty on the deed of assignment to render it invalid, null and void to effect the transfer of the property. Therefore, the appellant would not be able to rely on the exceptions in the case of fraud or forgery as provided in s. 340(2)(a) and (b) of the NLC respectively.

D [34] The other exception under s. 340(2)(b) of the NLC which is of relevance to the instant appeal, is that the registration or transfer was "obtained by means of an insufficient or void instrument". The void instrument referred to in the context of the factual matrix of this case is the memorandum of transfer in Form 14A. In our view, the deed of assignment (exh. P6) is not a conveyance document as envisaged in ss. 215, 217, 218, and in particular, s. 340(2) of the NLC. Thus, the transfer of the property by the second respondent to RKM Sharbudeen cannot be invalidated by questioning the validity of the deed of assignment (exh. P6) which is not the conveyance document.

E [35] From a reading of the relevant provisions of the Stamp Act 1949 together with the NLC, we agree with the respondents that the title of RKM Sharbudeen and his estate cannot be defeated by merely questioning the invalidity of the deed of assignment, instead of challenging it mainly on Form 14A.

F [36] For the reasons stated above, we find no merit in the appeal to warrant appellate intervention. Accordingly, we dismiss the appeal of the appellant with costs of RM15,000 to the first respondent, and RM10,000 to the second respondent, subject to payment of the allocatur fee. The deposit is to be refunded to the appellant.

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